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DREAM PROPERTY SDN BHD

v.

ATLAS HOUSING SDN BHD

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COURT OF APPEAL, PUTRAJAYA
ZULKEFLI MAKINUDIN JCA
LOW HOP BING JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: J-02-1160-2006]

C

2 NOVEMBER 2007

CIVIL PROCEDURE: *Summary judgment - Summary disposal of suit - Contract for sale and purchase of land - Appeal against decision allowing application under O. 14A Rules of the High Court 1980 to court*

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to determine date of delivery of vacant possession of land - Whether such issue suitable to be determined under O. 14A - Whether O. 14A application pertinent and in order - Rules of the High Court 1980, O. 14A

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This was an appeal by the defendant against the decision of the High Court allowing the plaintiff's application for summary disposal of a suit filed by the plaintiff against the defendant on a point of law under O. 14A of the Rules of the High Court 1980 ('RHC'), and entering summary judgment in favour of the plaintiff. *Vide* a

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sale and purchase agreement executed between the plaintiff and the defendant on 19 November 2004 ('Agreement'), in consideration of RM33,500,000, the plaintiff agreed to sell and the defendant agreed to buy the land covering an area of 14.4 acres ('said land'), with 40 squatters and a school known as Sekolah Rendah Hwa Nan ('said school') thereon. The Agreement contained

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special conditions (1) and (3), with which compliance was required. In special condition (1), the plaintiff was to evict the 40 squatters and relocate the said school in order to hand over vacant possession of the said land to the defendant. Special

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condition (3) stated that from the date the plaintiff confirms in writing that vacant possession of the said land is ready to be delivered to the defendant and upon inspection and confirmation by the defendant, the defendant shall have four months from the said date to settle the balance purchase price to the plaintiff, with

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an automatic extension of two months provided that the defendant pay late interest to the plaintiff.

The plaintiff claimed that vacant possession of the said school and, hence, the said land, was delivered to the defendant on 21 November 2005. The defendant, however, contended that vacant possession of the said land was delivered to it on 28 February 2006 instead of 21 November 2005. The plaintiff filed an action against the defendant in the court below, claiming, *inter alia*: (i) a declaration that vacant possession of the said land had been delivered by the plaintiff to the defendant on 21 November 2005; and (ii) a declaration that the defendant had failed to pay to the plaintiff the balance purchase price and the interest for the extended period on or before 21 May 2006, and therefore, the deposit of 10% of the purchase price paid by the defendant was forfeited by the plaintiff. The plaintiff thereafter filed an application under O. 14A of the RHC for the court to determine the date of delivery of vacant possession of the said land to the defendant. The defendant opposed the plaintiff's O. 14A application, *inter alia*, on the ground that there was a dispute as to the material facts that was evident in the parties' affidavits, and the action, thus, was not suitable to be determined under O. 14A of the RHC. It was also the defendant's contention that the plaintiff's application had failed to satisfy the prerequisites of O. 14A of the RHC for the action to be determined under the said Order. The learned judicial commissioner ('JC'), however, decided that the issue on the date of delivery of vacant possession of the said land was suitable to be determined under O. 14A of the RHC, and allowed the plaintiff's application. Hence, the present appeal by the defendant.

Held (dismissing the appeal)
Per Zulkefli Makinudin JCA (dissenting):

(1) The plaintiff's application failed to satisfy the prerequisites of O. 14A of the RHC since prayer (1) of the plaintiff's application sought determination of a question of fact and not of law. A factual question such as that posed by the plaintiff should be determined in a full trial, not summarily under O. 14A of the RHC. It was also to be noted that there was no question of law framed or a specific question on the construction of the agreement forwarded by the plaintiff to the court for consideration. This was apparent in the plaintiff's O. 14A application. On this ground alone, wherein there was no question of law or a specific question on the construction of the document framed, the plaintiff's application ought to have been dismissed by the JC. (paras 4 & 5)

(2) Order 14A of the RHC is not a vehicle for which the court is required to interpret the statement of claim to decide what point of law arises before deciding on it. An application under O. 14A of the RHC is to decide clear points of law or construction that are apparent on the pleadings. In this case, the JC proceeded to hear the plaintiff's O. 14A application without the benefit of the defendant's defence, which had yet to be filed at the time of the hearing of the application. Instead, the JC thought it fit to choose to only confine himself to the averments made by the plaintiff in its statement of claim. He had failed to sufficiently identify the relevant issues arising from the action, which necessarily ought to include the defendant's defence to the action. Therefore, the JC was not in any position to make the order that he did *ie*, that the plaintiff's action against the defendant was suitable for determination under O. 14A of the RHC. (para 6)

(3) From the affidavits filed by the defendant in opposing the plaintiff's O. 14A application, it was clearly shown that there was a serious dispute as to the material facts *vis-à-vis* the date of delivery of vacant possession of the said school to the defendant. The said school was still not relocated in November 2005, contrary to the plaintiff's claim. One Yiap Toon Cheng from the defendant company, who was asked by the plaintiff's representatives to inspect the said school, did not confirm on 25 November 2005 that vacant possession of the said school was given on the said date. The said school's administration did not allow the defendant unrestricted access to the said school after the visit on 21 November 2005, contrary to the plaintiff's claim. It was only on 28 February 2006 that the defendant was given the keys to the said school by the plaintiff. It was also noted that the defendant's solicitors did write and refute the plaintiff's solicitors' suggestion that vacant possession of the said land had been delivered on 21 November 2005. Despite the entrenched principles of law that the court will not exercise its jurisdiction under O. 14A of the RHC on the basis of facts that are strenuously being disputed, yet, the JC proceeded with the plaintiff's O. 14A application by embarking on an expedition to evaluate conflicting affidavit evidence. (paras 7, 8 & 9)

(4) The defendant's contention that the plaintiff's application for summary disposal of the suit under O. 14A of the RHC was inappropriate and must fail was further strengthened by the fact that this court had already allowed the defendant's application to adduce and refer to new and further evidence during the present appeal under the defendant's notice of motion in encl. (24a). Exhibits "YTC1", "YTC2", "YTC3", "YTC4" and "YTC5" ('the exhibits') were the new documentary evidence that the defendant sought to be considered and were relevant to the issue raised in this appeal. The JC had reached the decision that the date of delivery of vacant possession of the said land must be on 21 November 2005 since he had found that the said school had been relocated before the date of joint inspection on 21 November 2005, and he therefore proceeded to allow the plaintiff's O. 14A application. However, the exhibits clearly showed that the said school had not been relocated on 21 November 2005, contrary to the claim made by the plaintiff in its affidavits in support of the O. 14A application. The exhibits were all documents emanating from the said school administration clearly and distinctly supporting the defendant's position and contention in the court below that it did not obtain vacant possession of the said land on 21 November 2005. (paras 4 & 12)

(5) For the reasons stated above, the JC had arrived at a wrong decision in the O. 14A application of the plaintiff. (para 13)

Per Low Hop Bing and Zainun Ali JJCA delivering the majority judgment of the court:

(1) Upon a reasonable reading of prayer (1) in the plaintiff's application, there was no doubt that the plaintiff was seeking a construction of a document *ie*, the Agreement, in particular cl. 12 and special conditions (1) and (3) thereof. O. 14A r. 1(1) of the RHC enables the High Court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action, and such determination will finally determine the entire cause or matter or any claim or issue therein. Where the construction of a document will finally determine an issue under O. 14A and that issue is a dominant feature of a case, the High Court ought to proceed to so determine such issue. In the light of the above analysis,

A the plaintiff's application came within the ambit of the "construction of document" that is expressly provided in O. 14A r. 1(1) of the RHC. (paras 37, 38, 39, 40, 41, 120 & 121)

B **(2)** The alleged disputes of fact were, on the current set of facts in the instant appeal, largely misconceived since the said "disputes of fact" related to the problems the said school had with the plaintiff. The defendant was not privy to the understanding or agreement which the plaintiff had long had C with the said school administrators. For the defendant to take advantage of the said school's problems with the plaintiff merely to show the existence of facts in dispute manifested the defendant's machinations in trying to put off paying the balance of the purchase price. It was also irrelevant since the D defendant had nothing to do with the plaintiff's problems with the said school. (paras 120 & 121)

(3) From the established case authorities, the defendant's proposition that a defence must first be filed before the court can hear an application under O. 14A of the RHC was E misconceived. The scope of O. 14A is such that "real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the F facts as found". (paras 141 & 142)

(4) The principles applicable to affidavits in an O. 14 application are equally applicable to an O. 14A application. It is trite that a mere assertion in an affidavit of a given situation, which is to be the foundation of a defence, does not provide leave to G defence. It is imperative for the court to look at the whole situation and ask itself whether the defendant has satisfied the court that there is a reasonable probability of the defendant having a *bona fide* defence. In this instance, the JC in the court below had identified and made a more than adequate H appraisal of the material facts pleaded and found them to be obviously undisputed. (paras 146, 147, 148 & 149)

(5) The defendant's submission that the deponents were incompetent to attest to the said affidavits was untenable since I the essential facts relied on by the plaintiff were not hearsay. They were attested to by persons who had personal knowledge of the same. The plaintiff was actually relying on

the written acknowledgment by the defendant's representative on 21 November 2005 that the said school had been relocated. This was further confirmed by the letters dated 22 and 25 November 2005 respectively issued by the defendant's solicitors. Thus, in fact, the plaintiff was not resorting to hearsay affidavits. (paras 60 & 171)

(6) In the light of the plaintiff's pleadings in its statement of claim, it was abundantly clear that the defendant's submission that the JC had considered the construction of the word "relocation" as meaning "vacant possession" despite the absence of pleadings in the plaintiff's statement of claim was wholly without merit. (paras 61, 62, 63 & 64)

(7) Upon a true construction of special conditions (1) and (3) in the Agreement and the correspondence between the parties' respective solicitors, vacant possession was ready to be delivered on 21 November 2005 and the completion date was 21 March 2006, with an automatic extension of two months. The date on which vacant possession must be given was the completion of the sale and purchase which, according to item 10 of the schedule to the Agreement and special condition (1), was when the balance of the purchase price was paid *ie*, four months plus two months from the date when the plaintiff confirmed that they were ready to give vacant possession, and after inspection and confirmation by the defendant. The plaintiff had stated that "vacant possession is ready to be given" on 16 November 2005, and the inspection and confirmation by the defendant had been effected on 21 November 2005. The balance of the purchase price had to be paid within four plus two months from 21 November 2005 *ie*, latest by 21 May 2006 as the extended completion date. However, the defendant had not done so. (paras 73, 74, 75 & 76)

(8) The defendant had alternatively contended that the plaintiff had only given the defendant vacant possession, not on 21 November 2005, but on 28 February 2006 when the key to the fourth gate of the said school was given to the defendant. Even by taking this date of 28 February 2006, delivery of vacant possession of the said land by the plaintiff to the defendant was still clearly some three months before the

completion date *ie*, 21 May 2006 when the defendant had to effect payment of the balance of the purchase price, but had failed to do so. (para 77)

(9) After considering this appeal in its entirety, the plaintiff's application under O. 14A of the RHC seeking the court's determination on a point of construction of the relevant clauses in the Agreement pertaining to the date of vacant possession was pertinent and was in order. (para 178)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan defendan terhadap keputusan Mahkamah Tinggi kerana membenarkan permohonan plaintif untuk memutuskan guamannya terhadap defendan melalui kaedah penghakiman terus berdasarkan satu persoalan undang-undang di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan memerintahkan penghakiman terus kepada plaintif. Melalui satu perjanjian jual beli yang dimeterai di antara plaintif dan defendan pada 19 November 2004 ('Perjanjian'), plaintif bersetuju untuk menjual dan defendan bersetuju untuk membeli sebidang tanah seluas 14.4 ekar ('tanah tersebut') di mana terdapat 40 setinggan dan sebuah sekolah yang dipanggil Sekolah Rendah Hwa Nan ('sekolah tersebut') di atasnya dengan balasan sebanyak RM33,500,000. Perjanjian mengandungi peruntukan-peruntukan khas (1) dan (3), yang perlu dipatuhi. Di dalam peruntukan khas (1), plaintif hendaklah mengusir semua 40 setinggan dan memindahkan sekolah tersebut sebelum menyerahkan milikan kosong tanah tersebut kepada defendan. Peruntukan khas (3) menyatakan bahawa bermula dari tarikh plaintif mengesahkan ia bersedia untuk menyerahkan milikan kosong kepada defendan dan atas pemeriksaan dan pengesahan oleh defendan, defendan mempunyai masa empat bulan dari tarikh tersebut untuk membayar baki harga belian kepada plaintif, dengan lanjutan masa automatik selama dua bulan dengan syarat defendan membayar faedah kelewatan kepada plaintif.

Plaintif mendakwa bahawa milikan kosong sekolah tersebut, dan kerana itu, tanah tersebut, telah diserahkan kepada defendan pada 21 November 2005. Defendan, bagaimanapun menegaskan bahawa milikan kosong tanah tersebut hanya diserahkan kepadanya pada 28 Februari 2006 dan bukannya 21 November 2005. Plaintif telah memfail tindakan terhadap defendan di mahkamah di bawah, menuntut, antara lain: (i) suatu deklarasi bahawa milikan kosong tanah tersebut telah diserahkan kepada defendan pada

21 November 2005; dan (ii) suatu deklarasi bahawa defendan telah gagal membayar kepada plaintif baki harga belian dan faedah kerana masa yang dilanjutkan kepada atau sebelum 21 Mei 2006, sekaligus mewajarkan plaintif merampas deposit 10% harga belian yang dibayar oleh defendan. Berikutnya, plaintif memfail permohonan di bawah A. 14A KMT supaya mahkamah menentukan tarikh penyerahan milikan kosong tanah tersebut kepada defendan. Defendan menentang permohonan A. 14A plaintif, antara lain atas alasan bahawa terdapat pertikaian pada fakta-fakta material seperti yang terserlah dari afidavit-afidavit yang difailkan pihak-pihak, yang menyebabkan tindakan tidak sesuai untuk dilupuskan di bawah A14A KMT. Defendan berhujah seterusnya bahawa permohonan plaintif gagal memuaskan kehendak-kehendak A. 14A KMT bagi membolehkannya diputuskan di bawah Aturan tersebut. Yang arif pesuruhjaya kehakiman ('JC'), bagaimanapun, memutuskan bahawa isu mengenai tarikh penyerahan milikan kosong tanah tersebut adalah sesuai untuk diputuskan di bawah A. 14A KMT dan dengan itu membenarkan permohonan plaintif. Defendan dengan itu merayu.

Diputuskan (menolak rayuan)
Oleh Zulkefli Makinudin HMR (menentang):

(1) Permohonan plaintif gagal memuaskan kehendak-kehendak A. 14A KMT kerana prayer (1) permohonan plaintif memohon keputusan suatu persoalan fakta dan bukannya undang-undang. Persoalan fakta seperti yang dikemukakan oleh plaintif harus diputuskan di dalam perbicaraan penuh, bukannya secara terus di bawah A. 14A KMT. Harus juga diperhatikan bahawa tiada persoalan undang-undang telah dirangka dan tiada persoalan spesifik berkaitan pentafsiran perjanjian telah dikemukakan oleh plaintif kepada mahkamah untuk pertimbangan. Ini jelas dari permohonan A. 14A plaintif. Atas alasan ini sahaja, di mana tiada persoalan undang-undang atau persoalan spesifik mengenai pentafsiran dokumen telah dirangka, permohonan plaintif sudah harus ditolak oleh JC.

(2) Aturan 14A KMT bukanlah satu alat di mana mahkamah dikehendaki mentafsirkan pernyataan tuntutan bagi menentukan persoalan undang-undang yang berbangkit sebelum membuat keputusan terhadapnya. Permohonan di bawah A. 14A KMT adalah bagi memutuskan persoalan yang jelas merupakan persoalan undang-undang atau pentafsiran yang kelihatan dituntut oleh pliding. Dalam kes ini, JC telah mendengar

permohonan A14A plaintif tanpa manfaat pembelaan defendan, yang masih belum difailkan semasa permohonan didengar. JC merasakannya wajar untuk menghadkan dirinya hanya kepada penegasan-penegasan yang dibuat oleh plaintif dalam pernyataan tuntutannya. Beliau gagal mengenal pasti secukupnya isu-isu relevan yang berbangkit dari tindakan, yang sepatutnya merangkumi pembelaan defendan terhadap tuntutan tersebut. Oleh itu JC tidak berada dalam keadaan yang selesa untuk membuat perintah yang dibuatnya, iaitu bahawa tindakan plaintiff terhadap defendan adalah sesuai untuk pemutusan di bawah A. 14A KMT.

(3) Dari afidavit-afidavit yang difailkan defendan dalam menentang permohonan A. 14A plaintif, telah dibangkitkan bahawa terdapat pertikaian yang serius mengenal fakta-fakta material *vis-à-vis* tarikh penyerahan milikan kosong sekolah tersebut kepada defendan. Bertentangan dengan dakwaan plaintif, sekolah tersebut masih belum dipundah ke tempat lain pada bulan November 2005. Seorang Yiap Toon Cheng dari syarikat defendan, yang diminta oleh wakil plaintif untuk memeriksa sekolah tersebut, tidak mengesahkan pada 25 November 2005 bahawa milikan kosong sekolah tersebut telah diserahkan pada tarikh tersebut. Juga, bertentangan dengan dakwaan plaintif, pihak pentadbiran sekolah tidak memberikan defendan akses tanpa had ke sekolah tersebut selepas lawatan pada 21 November 2005. Hanyalah pada 28 Februari 2006 defendan telah diberikan kunci-kunci sekolah tersebut oleh plaintif. Perlu juga diingat bahawa peguamcara defendan telah menulis dan menyangkal pengataan peguamcara plaintif bahawa milikan kosong tanah tersebut telah diserahkan pada 21 November 2005. Walaupun terdapat prinsip undang-undang mantap bahawa mahkamah tidak akan melaksanakan bidangkuasanya di bawah A. 14A KMT jika fakta-fakta dipertikai dengan seriusnya, JC, namun begitu, telah meneruskan dengan permohonan A. 14A plaintif dan melakukan penilaian terhadap keterangan-keterangan yang bercanggah.

(4) Hujah defendan bahawa permohonan plaintif supaya tindakan diselesaikan secara terus di bawah A. 14A KMT adalah tidak wajar dan seharusnya gagal telah diperkuat oleh fakta bahawa mahkamah ini telahpun membenarkan permohonan defendan untuk mengemukakan dan merujuk kepada keterangan-keterangan tambahan baru semasa rayuan di sini di bawah notis usul defendan di dalam lampiran (24a). Eksibit-eksibit

"YTC1", "YTC2", "YTC3", "YTC4" dan "YTC5" ('eksibit-eksibit') adalah keterangan dokumentari baru yang dipohon defendan supaya dipertimbangkan yang mana ia adalah relevan kepada isu yang dibangkitkan di rayuan ini. JC telah mencapai keputusan bahawa tarikh penyerahan milikan kosong tanah tersebut adalah pada 21 November 2005 kerana beliau mendapati bahawa sekolah tersebut telah pun dipindah ke tempat baru sebelum tarikh pemeriksaan bersama pada 21 November 2005, dan beliau dengan itu telah membenarkan permohonan A. 14A plaintif. Namun begitu, bertentangan dengan dakwaan plaintif di dalam afidavit-afidavit sokongan terhadap permohonan A. 14Anya, eksibit-eksibit menunjukkan bahawa sekolah tersebut tidak dipindahkan pada 21 November 2005. Eksibit-eksibit adalah dokumen-dokumen yang berasal dari pihak pentadbiran sekolah tersebut dan secara jelas dan khusus menyokong kedudukan defendan serta hujah defendan di mahkamah di bawah bahawa ia tidak memperoleh milikan kosong tanah tersebut pada 21 November 2005.

(5) Atas alasan-alasan yang dikemukakan di atas, JC telah mencapai keputusan yang salah dalam permohonan O. 14A plaintif.

Oleh Low Hop Bing dan Zainun Ali HHMR menyampaikan penghakiman majoriti mahkamah:

(1) Atas pembacaan munasabah prayer (1) dalam permohonan plaintif, tiada keraguan bahawa plaintif memohon pentafsiran suatu dokumen, iaitu, Perjanjian, khususnya perenggan 12 dan syarat khas (1) dan (3) di situ. Aturan 14A k. 1(1) KMT membolehkan Mahkamah Tinggi menentukan mana-mana persoalan undang-undang atau pentafsiran dokumen di mana mahkamah merasakan bahawa persoalan tersebut adalah sesuai untuk pemutusan tanpa memerlukan perbicaraan penuh tindakan, dan pemutusan sedemikian akan memutuskan dengan muktamad keseluruhan halperkara atau kausa atau mana-mana tuntutan atau isu di situ. Di mana pentafsiran suatu dokumen di bawah A. 14A akan dengan muktamadnya memutuskan suatu isu dan isu tersebut merupakan ciri yang dominan sesuatu kes, maka Mahkamah Tinggi harus segera memutuskan isu tersebut. Berdasarkan analisa ini, permohonan plaintif berada di dalam ambit "pentafsiran dokumen" yang diperuntukkan secara ekspres di dalam A. 14A k. 1(1) KMT.

(2) Berdasarkan urutan fakta di rayuan ini, kebanyakan fakta-fakta bertikai yang didakwa adalah tersasul kerana "pertikaian fakta" yang dikatakan itu adalah berhubungkait dengan masaalah-masaalah di antara sekolah tersebut dengan plaintif. Defendan bukan privi kepada persefahaman atau perjanjian yang sudah lama dibuat oleh plaintif dengan pentadbir-pentadbir sekolah tersebut. Perbuatan defendan mengambil peluang atas masaalah-masaalah sekolah tersebut dengan plaintif cuma untuk menunjukkan kewujudan fakta-fakta yang dipertikai terserlah dari sikapnya yang enggan membayar baki harga belian. Ia adalah tidak relevan kerana defendan tiada kena mengena dengan masaalah plaintif dengan sekolah tersebut.

(3) Dari autoriti-autoriti kes mantap, cadangan defendan bahawa pembelaan hendaklah terlebih dahulu difailkan sebelum mahkamah boleh mendengar permohonan di bawah A. 14A KMT juga tersasul. Ruang litup A. 14A adalah sebegitu rupa menyebabkan "percubaan yang serius dan sebenarnya hendaklah dibuat untuk mengenal pasti fakta-fakta material yang diplid yang jelas tidak dipertikai ataupun yang tidak seharusnya dipertikai dan kemudian menggunapakai kaedah yang relevan kepada fakta-fakta seperti yang didapati".

(4) Prinsip-prinsip yang terpakai kepada afidavit-afidavit di dalam permohonan A. 14 adalah juga terpakai kepada permohonan A. 14A. Adalah lazim bahawa suatu pengataan semata-mata di dalam suatu afidavit dalam satu keadaan tertentu yang menjadi asas kepada pembelaan, tidak memberikan apa-apa izin atau 'leave' kepada pembelaan. Adalah perlu bahawa mahkamah melihat kepada keseluruhan keadaan dan bertanyakan dirinya sama ada defendan telah memuaskan mahkamah bahawa terdapat kemungkinan yang munasabah bahawa defendan mempunyai pembelaan yang *bona fide*. Dalam kes ini, JC di mahkamah di bawah telah mengenal pasti fakta-fakta material dan telah membuat penilaian yang secukupnya ke atas fakta-fakta yang diplid dan mendapatinya sebagai jelas tidak dipertikai.

(5) Hujah defendan bahawa deponen-deponen adalah tidak berkompeten untuk mengikrarkan afidavit-afidavit tersebut tidak boleh diterima oleh kerana fakta-fakta penting yang plaintif bergantung kepadanya bukanlah bersifat dengar cakap. Fakta-fakta telah diikrarkan oleh mereka yang mempunyai pengetahuan peribadi mengenainya. Plaintif sebenarnya

bergantung kepada pengakuan bertulis wakil defendan pada 21 November 2005 bahawa sekolah tersebut telah pun dipindahkan. Ini telah disahkan seterusnya oleh surat-surat bertarikh 22 dan 25 November 2005 masing-masing yang dikeluarkan oleh peguamcara defendan. Jelas bahawa plaintif tidak bergantung kepada afidavit dengar cakap.

(6) Berdasarkan pliding-pliding plaintif di dalam pernyataan tuntutannya, amat jelas bahawa hujah defendan bahawa JC telah menimbang untuk mentafsir perkataan "relocation" sebagai bermaksud "milikan semula" walaupun dengan ketiadaan pliding-pliding dalam pernyataan tuntutan plaintif adalah tidak bermerit langsung.

(7) Mengambilkira pentafsiran sebenar syarat-syarat khas (1) dan (3) di dalam Perjanjian dan surat menyurat di antara peguamcara-peguamcara masing-masing pihak, milikan kosong sudah sedia untuk diserahkan pada 21 November 2005 dan tarikh penyiapan adalah 21 Mac 2006, dengan lanjutan secara automatik selama dua bulan. Tarikh di mana milikan kosong mesti diserahkan adalah semasa jual beli terlaksana yang, menurut item 10 jadual kepada Perjanjian dan syarat khas (1), adalah apabila baki harga belian dibayar, iaitu empat bulan dicampur dua bulan dari tarikh plaintif mengesahkan bahawa mereka sudah bersedia untuk memberi milikan kosong, dan selepas pemeriksaan dan pengesahan oleh defendan. Plaintif telah menyatakan bahawa "milikan kosong bersedia untuk diberikan" pada 16 November 2005, dan pemeriksaan dan pengesahan oleh defendan telah dibuat pada on 21 November 2005. Baki harga belian mesti dibayar dalam tempoh empat campur dua bulan dari 21 November 2005, iaitu paling lewat pada tarikh lanjutan pelaksanaan jual beli pada 21 Mei 2006. Bagaimanapun, defendan tidak berbuat demikian.

(8) Secara alternatifnya defendan berhujah bahawa plaintif hanya memberi milikan kosong tidak pada 21 November 2005 tetapi pada 28 Februari 2006 bilamana kunci kepada pintu pagar keempat sekolah tersebut diserahkan kepada defendan. Jikapun tarikh 28 Februari 2006 diambilkira, penyerahan milikan kosong tanah tersebut masih lagi tiga bulan sebelum tarikh pelaksanaan jual beli, iaitu 21 Mei 2006 bila defendan perlu membuat bayaran baki harga belian, tetapi gagal berbuat demikian.

(9) Setelah menimbang rayuan ini secara keseluruhan, permohonan plaintif di bawah A. 14A KMT memohon keputusan mahkamah di atas persoalan pentafsiran perenggan yang relevan dalam Perjanjian berkaitan dengan tarikh milikan kosong adalah pertinen dan teratur.

Case(s) referred to:

Dato Ng Tian Seng v. Toh Pee Yok & Ors [2004] 5 CLJ 153 HC ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***

Esso Standard Malaysia Berhad v. South Cross Airways (Malaysia) Bhd [1972] 2 MLJ 168 ***(refd)***

European Asian Bank AG v. Punjab and Sind Bank (No 2) [1983] 2 All ER ***(refd)***

Federal Insurance Co v. Nakano Singapore (Pte) Ltd [1992] 1 SLR 390 ***(refd)***

Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA ***(refd)***

Hue Chooi Yin v. Chew Pit King [2006] 4 MLJ 791 ***(refd)***

Korso Finance Establishment Anstalt v. John Wedge, unreported, Court of Appeal, Transcript No 14/387 ***(refd)***

Ladd v. Marshall [1954] 1 WLR 1489 ***(refd)***

Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***

Lekaz Constructions Sdn Bhd v. Kop Petroleum Sdn Bhd [2003] 4 CLJ 377 HC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Mohamed v. Alaga & Co [1998] 2 All ER 720 ***(refd)***

MP-Bilt Pte Ltd v. Oey Widarto [1999] 3 SLR 592 ***(refd)***

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***

Muhamad Zain Sidek v. Suruhanjaya Perkhidmatan Awam Malaysia [2002] 779 MJU 1 ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu [2003] 4 CLJ 337 CA ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur [2004] CLJ 1 LNS 58 HC ***(refd)***

State Bank of India v. Murjani Marketing Group Limited And Others EWCA 27 March 1991 ***(refd)***

Tokyo Investment Pte Ltd & Anor v. Ian Chor Thing [1993] 3 SLR 170 ***(refd)***

Vohrah – Merican Sdn Bhd v. Gombak Land Sdn Bhd [2006] 3 AMR 263 ***(refd)***

Watson & Anor v. Dutton Forshaw Motor Group Ltd & Ors EWCA 3245 ***(refd)***

Wiedeman v. Walpole [1891] 2 QB 534 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181
Courts of Judicature Act 1964, s. 69(3)
Rules of the Court of Appeal 1994, r. 7(3A)
Rules of the High Court 1980, O. 14, O. 14A r. 1(1), O. 33 r. 2, O. 41 r. 5(1)

Rules of the Supreme Court [UK], O. 14, O. 14 r. 1(1)

Other source(s) referred to:
Singapore Court Practice 1999, p 540, para 14/13/4

For the appellant - N Segaram (CH Mong with him); M/s Shearn Delamore & Co
For the respondent - DP Vijandren (Robert Devan, Analiza Kassim & Ms Komathi with him); M/s Robert Devan & Co

[Appeal from High Court, Johor Bahru; Civil Suit No: MT2-22-642-2006]

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin JCA:

Introduction

[1] This is an appeal by the defendant against the decision of the learned Judicial Commissioner of the High Court at Johor Bahru allowing the plaintiff's application for summary disposal of the suit filed by the plaintiff against the defendant on a point of law under O. 14A of the Rules of the High Court 1980 ("RHC 1980") and entering summary judgment in favour of the plaintiff.

[2] At the appeal stage before the Court of Appeal the defendant filed a notice of motion in encl. (24a) pursuant to r. 7 of the Rules of the Court of Appeal 1994 and s. 69 of the Courts of Judicature Act 1964 for an order that the defendant be at liberty, upon the hearing of the present appeal to adduce and refer to the fresh and further evidence as exhibited in exhs. "YTC1", "YTC2", "YTC3", "YTC4" and "YTC5" to the affidavit of Yiap Toon Cheng affirmed on 16 August 2007. Having heard the arguments of learned counsel for the defendant and the plaintiff we unanimously allowed the defendant's application in encl. (24a) and made an order in terms of the application. We find that the

defendant has satisfied the necessary conditions as set out in r. 7(3A) of the Rules of the Court of Appeal 1994 and s. 69(3) of the Courts of Judicature Act 1964. We also find the defendant has justified the reception of the fresh evidence under the principles as set out in the case of *Ladd v. Marshall* [1954] 3 All ER 745.

Background Facts Of The Case

[3] The relevant background facts of the case are as follows:

(1) By a written agreement dated 19 November 2004 ("the agreement") entered between the plaintiff and the defendant, the plaintiff agreed to sell to the defendant a piece of land held under Geran 101840 Lot 325, Mukim Simpang Kanan, District of Baru Pahat, Johor ("the said property") for RM33,500,000 ("purchase price"), and the defendant agreed to purchase the same subject to the terms and conditions as agreed by the parties.

(2) One of the terms and conditions of the agreement provides that, the plaintiff shall be given nine months from the date of the said agreement to relocate a Chinese school built on the said property, namely, SJK (C) Hwa Nan ("the said school") in order to hand over vacant possession of the said property to the defendant.

(3) It is also a term of the agreement that, from the date the plaintiff confirms in writing that vacant possession of the said property is ready to be delivered to the defendant and upon inspection and confirmation by the defendant, the defendant shall have four months from the said date to settle the balance purchase price to the plaintiff, with an automatic extension of two months on condition that the defendant shall pay late interest to the plaintiff.

(4) It is claimed by the plaintiff that vacant possession of the said school, hence the said property, was delivered to the defendant on 21 November 2005. However, the defendant is contending that vacant possession of the said school was not delivered to the defendant on 21 November 2005, but instead, it was on 28 February 2006.

(5) The plaintiff proceeded to file an action against the defendant in the court below, and in its action, the plaintiff claims against the defendant, *inter alia*:

(a) a declaration that vacant possession of the said property has been delivered by the plaintiff to the defendant on 21 November 2005; and

(b) a declaration the defendant has failed to pay to the plaintiff the balance purchase price and the interest for extended period on or before 21 May 2006, and therefore, the deposit of 10% of the purchase price paid by the defendant is forfeited by the plaintiff.

(6) The plaintiff thereafter filed an application under O. 14A of the RHC 1980 *vide* summons in chambers dated 12 September 2006 ("plaintiff's O. 14A application") for the court to determine the date of delivery of vacant possession of the said school (hence, the said property) to the defendant.

(7) The defendant opposed the plaintiff's O. 14A application, *inter alia*, on the ground that there is a dispute as to the material facts which is evident in the parties' affidavits and therefore the action is not suitable to be determined under O. 14A of the RHC 1980. It is also the defendant's contention that the plaintiff's O. 14A application has failed to satisfy the prerequisites of O. 14A of the RHC 1980 for the action to be determined under the said order.

(8) On 10 October 2006, the learned Judicial Commissioner decided that the issue on the date of delivery of vacant possession of the said property is suitable to be determined under O. 14A of the RHC 1980, and proceeded to allow the plaintiff's O. 14A application ("order"). This is the defendant's appeal against the said order.

Decision On Appeal

[4] It is my judgment that the plaintiff's O. 14A application (encl. (8)") fails to satisfy the prerequisites of O. 14A of the RHC 1980. The plaintiff's application in encl. (8) as I see it is seeking determination of a question of fact and not law. Order 14A of the RHC 1980 provides that the court may upon the application of a party determine any question of law or construction of any document arising in any cause or matter where it appears to the

court that such question is suitable for determination without the full trial of the action and such determination will finally determine the cause or matter. The plaintiff's O. 14A application essentially seeks the High Court determination a question based on prayer (1) as follows:

> (1) Menurut Aturan 14A Kaedah-Kaedah Mahkamah Tinggi 1980, kandungan Perjanjian Jualbeli bertarikh 19hb November 2004 dibuat di antara plaintif dan defendan ditafsirkan, terutamanya klausa 12 Perjanjian tersebut dan Syarat-syarat Khas No. 1 dan No. 3 dalam Perjanjian tersebut untuk memutuskan tarikh plaintif menyerahkan milikan kosong tanah yang dikenali sebagai Geran No. 101840 Lot Not 325, Mukim Simpang Kanan, Daerah Batu Pahat kepada Defendan ... .

English Translation

> (1) Pursuant to Order 14A Rules of the RHC 1980, the contents of the Sale and Purchase Agreement dated 19 November 2004 made between the plaintiff and the defendant be construed, in particular clause 12 of the Agreement and Special Conditions No. 1 and No. 3 of the Agreement to determine the date the plaintiff delivered vacant possession of the land known as Geran No. 101840, Lot No. 325, Mukim of Simpang Kanan, to the Defendant ...

[5] It is clear that based on the said prayer (1) it is for a determination on a question of fact. A factual question, such as that posed by the plaintiff above should be determined in a full trial, and should not be determined summarily under the O. 14A of the RHC 1980 procedure. It is also to be noted that there is no question of law framed or a specific question on the construction of the agreement forwarded by this plaintiff to the court for consideration. This is apparent in the plaintiff's O. 14A application. On the need to have proper question of law or a specific question on the construction of document framed, I would like to refer to the case of *Petroleum Nasional Bhd. v. Kerajaan Negeri Terengganu* [2003] 4 CLJ 337 wherein the court therein inter alia had this to say:

> The primary issue in the suit was whether the plaintiff had, at any time, sovereign rights over petroleum in the continental shelf adjacent to the coast of Terengganu. This primary issue was contained in the first three questions posed in the defendant's application. All the questions were purely questions of law.

On this ground alone wherein there is no question of law or a specific question on the construction of the document framed, the said application by the plaintiff ought to have been dismissed by the learned Judicial Commissioner.

[6] I am also of the view that O. 14A of the RHC 1980 is not a vehicle for which the court is required to interpret the statement of claim to decide what point of law arises before deciding on it. An application under O. 14A of the RHC 1980 is to decide clear points of law or construction that are apparent on the pleadings. It is to be noted in this case the learned Judicial Commissioner proceeded to hear the plaintiff's O. 14A application without the benefit of the defendant's defence which had yet to be filed at that time of the hearing of the application. Instead, the learned Judicial Commissioner thought it fit to choose to only confine himself to the averments made by the plaintiff in its statement of claim. The learned Judicial Commissioner has failed to sufficiently identify the relevant issues arising from the action, which necessarily ought to include the defendant's defence to the action. Therefore, the learned Judicial Commissioner was not in any position to make the said order that he did, ie, that the plaintiff's action against the defendant was suitable for determination under O. 14A of the RHC 1980. On this point I would like to refer to the case of *Watson & Anor. v. Dutton Forshaw Motor Group Ltd. & Ors*., EWCA, 22 July 1998 wherein the Court of Appeal therein stated *inter alia* as follows:

> With the benefit of hindsight it is possible to see that this is where things began to go wrong. In fact the particulars would not be relevant to the O. 14A application either so far as the plaintiffs were concerned or so far as the defendants were concerned. The issue of law, if it was discernible at all, had to be discernible from the statement of claim and the defence. The judge himself ruled at the outset of the hearing of the O. 14A application on 17 October 1994 that he should not adjourn that hearing as he was requested to do by the plaintiffs' counsel on the basis that particulars were about to be delivered 'since it is not the function of particulars to take the place of necessary averments in the pleading.'

[7] It is trite law that, for the court to exercise its power to summarily dispose off an action under O. 14A of the RHC 1980, there should not be any dispute by the parties as to the relevant facts, or that the court, upon scrutinizing the pleadings, concludes that the material facts are not in dispute. (See the case of

Petroleum Nasional Bhd. v. Kerajaan Negeri Terengganu (supra)). In this case it is noted that from the affidavits filed by the defendant in opposing the plaintiff's O. 14A application, it is clearly shown that there is a serious dispute as to the material facts *vis-a-vis* the date of delivery of vacant possession of the said school to the defendant. The said school was still not relocated in November 2005 contrary to the plaintiff's claim. Yiap Toon Cheng from the defendant company who was asked by the plaintiff's representatives to inspect the said school, did not confirm on 21 November 2005 that vacant possession of the said school was given on the said date. The said school administration did not allow the defendant unrestricted access to the said school after the visit on 21 November 2005 contrary to the plaintiffs claim. It was only on 28 February 2006 that the defendant was given the keys to the said school by the plaintiff. (See pp. 137-140 Part B of the appeal record).

[8] It is also noted that the defendant's conveyancing solicitors, namely, Messrs. Ajmer Sandhu & Ong, did write and did refute the plaintiff's solicitors' suggestion that vacant possession of the said property had been delivered on 21 November 2005. (See pp. 276-280 Part C of appeal record).

[9] It is to be noted in this case despite the entrenched principles of law that the court will not exercise its jurisdiction under O. 14A of the RHC 1980 on the basis of facts which are strenuously being disputed, yet, the learned Judicial Commissioner proceeded with the plaintiff's O. 14A application by embarking on an expedition to evaluate conflicting affidavit evidence. This is evident in the learned Judicial Commissioner's grounds of judgment wherein amongst others he had stated as follows:

> (i) ... A few photographs of the new school and those present at the Opening Ceremony of the new school premises for Sekolah Hwa Nan were published in the article which reported, *inter alia*, that the Member of Parliament of Seri Gading Datuk Mohd Aziz announced a donation of RM30,000.00 for the school development funds. The photographs exhibited in the plaintiff's manager Tang Pei Hau's affidavit were confirmed as those taken by him personally on 18th November 2005. Those photographs showed the process of moving of the school ...
>
> (See p. 98 Part B of appeal record).

(ii) ... In Yiap's O.S. Affidavit, he had named 3 persons as being the 'school administration' who prevented the defendant from entering the school and who allegedly had a meeting with him on 17.2.2006 and 22.2.2006. A few letters were also exhibited in Dato' Tan's affidavit to show that 2 of those 3 persons denied reventing the defendant from entering the school. The third person named by Yiap Toon Cheng was one "Tan Yu Keng". However, Tan Yu Keng in his letter stated very clearly that he did not even meet Yiap Toon Cheng on 17.2.2006 or 22.2.2006 ...

(See p. 100 Part B of appeal record).

(iii) ... Looking at all the evidence submitted by both parties, I am sure if the headmaster and the school teachers of the School are called as witnesses in court, they will all confirm that the School had moved to their new premises in November 2005, and the parents of the students will also confirmed that they started attending classes at their new school premises in January 2006. I also have no doubt that if Y.B. Datuk Mohd Aziz (the Member of Parliament of Sri Gading) is asked in court as a witness, he will also confirm that he attended the Opening Ceremony of the new school premises for Sekolah Hwa Nan ...

(See pp. 102-103 Part B of appeal record).

[10] I am of the considered view the defendant's contention that the plaintiff's application for the summary disposal of the suit under O. 14A of the RHC 1980 is inappropriate and must fail is further strengthened by the fact that this court had already allowed the defendant's application to adduce and refer to the new and further evidence during the present appeal under the defendant's notice of motion in encl. (24a). Exhibits "YTC1", "YTC2", "YTC3", "YTC4" and "YTC5" are the new documentary evidence the defendant seeks to be considered in this appeal and are relevant to the issue raised in this appeal.

[11] The plaintiff is adamant with its position that the said school has been vacated and that it has delivered vacant possession of the said property on 21 November 2005. Contrary to the plaintiff's claim, the defendant has stated that it did not obtain vacant possession of the said property on 21 November 2005 as the defendant still did not obtain vacant possession of the said school premises which is part of the said property. The defendant has also stated that the said school administration of SJK (C) Hwa Nan repeatedly disallowed the defendant from entering the

said school premises after 21 November 2005. The defendant was being denied access to the said school premises from time to time by the said school administration until February 2006 when the plaintiff handed over the keys to the said school premises to the defendant on 28 February 2006.

[12] It is also pertinent to note that the learned Judicial Commissioner had reached the decision that the date of delivery of vacant possession of the said property must be on 21 November 2005 since he had found that the said school had been relocated before the date of joint inspection on 21 November 2005, and he therefore proceeded to allow the plaintiff's O. 14A application. (See paras 13-16 of the grounds of judgment at p. 98 Part B of appeal record). However, exhs. "YTC1", "YTC2", "YTC3", "YTC4" and "YTC5" produced at this appeal stage clearly show that the said school had not been relocated on 21 November 2005, contrary to the claim made by the plaintiff as in its affidavits in support of the said O. 14A application. Exhibits "YTC1", "YTC2", "YTC3", "YTC4" and "YTC5" are all documents emanating from the said school administration which clearly and distinctly support the defendant's position and contention in the court below that the defendant did not obtain vacant possession of the said property on 21 November 2005.

Conclusion

[13] For the reasons above stated, I am of the view that the learned Judicial Commissioner had arrived at a wrong decision in the O. 14A application of the plaintiff. I would allow the defendant's appeal with costs and set aside all the orders made by the High Court. Deposit paid by the defendant for this appeal is to be refunded to the defendant.

Low Hop Bing JCA:

Appeal

[14] Pursuant to the plaintiff's application in encl. (18) filed under O. 14A of the Rules of the High Court 1980 ("O. 14A") in Johor Bahru High Court on 10 October 2006, the learned judicial commissioner made the following orders:

(a) a declaration that vacant possession of the land held under Geran No. 101840, Lot No 325 in the mukim of Simpang Kanan, district of Batu Pahat ("the land") had been delivered by the plaintiff to the defendant on 21 November 2005;

(b) a declaration that the defendant had failed to pay to the plaintiff the balance of the purchase price and interest for extension of time on or before 21 May 2006, and so the 10% deposit paid by the defendant shall be forfeited to the plaintiff;

(c) the defendant to redeliver vacant possession of the land to the plaintiff;

(d) damages to be assessed, with interest thereon at 8% per annum from the date of the writ to the date of realization;

(e) the plaintiff to retain, as security for damages, the sum of RM5,150,000 paid on 24 August 2006 through the defendant's solicitors to the plaintiff's solicitors; and

(f) costs.

[15] On 19 October 2006, the defendant appealed to this court against the whole of the above decision.

[16] The parties herein are referred to in the same capacities as in the High Court.

Notice Of Motion

[17] At the hearing of the instant appeal on 29 August 2007, this court unanimously made an order in terms, allowing the defendant's notice of motion in encl. (24a) to adduce further evidence, as the defendant has fulfilled the requirements set out in r. 7(3A) of the Rules of the Court of Appeal 1994; s. 69(3) of the Courts of Judicature Act 1964; and the principles enunciated in *Ladd v. Marshall* [1954] 1 WLR 1489.

Factual Background

[18] *Vide* sale and purchase agreement executed between the plaintiff and the defendant on 19 November 2004 ("the SPA"), in consideration of RM33,500,000 ("the purchase price"), the plaintiff agreed to sell and the defendant agreed to buy the land covering an area of 5.8274 hectares or 14.4 acres, with 40 squatters and a school known as Sekolah Rendah Hwa Nan ("the school") thereon.

[19] Special condition 1 of the SPA provides as follows:

> 1. The parties hereto are aware that currently there are forty (40) squatters and a Chinese school on the said Property. The Vendor shall be given six (6) months from the date of the Sale and Purchase Agreement to clear the said squatters and nine (9) months to relocate the said School in order to hand over vacant possession of the said Property to the Purchaser. Within six (6) months from the date of this Agreement, the Vendor shall evict the forty (40) squatters and upon confirmation by the Purchaser of the aforesaid, the Purchaser shall pay to the Vendor a further sum equivalent to 2.5% of the Purchase Price. If the Vendor is unable to evict the said squatters within the said 6 months period, the Vendor shall not be entitled to the said sum early and the balance purchase price shall therefore be payable within the time stated in Section 10 of the Schedule hereto. The parties hereby expressly agree that the Vendor shall be given an automatic extension of three (3) months from the expiry of the time stipulated hereinabove (hereinafter referred to as "the Automatic Extension Period") to clear the squatters and relocate the school in the event the Vendor fails to complete the abovesaid within the time stipulated hereinabove. Thereafter, the Purchaser shall have the option to extend the completion date in the event the Vendor fails to evict the squatters and relocate the school after the Automatic Extension Period.

[20] The school occupied about 0.75 acre ie about 5% of the land. There were four gates to the school. The key to the fourth gate was given by the plaintiff to the defendant on 28 February 2006.

[21] Special condition 3 of the SPA reads:

> 3. *From the date that the Vendor confirms in writing that vacant possession is ready to be delivered to the Purchaser pursuant to Clause 1 above and upon inspection and confirmation by the Purchaser,* the Purchaser shall be given four (4) months from the date thereof to settle the balance of the Purchase Price to the Vendor, with an automatic extension of two (2) months commencing from the expiry of the aforesaid four (4) months provided that the Purchaser shall pay interest on the balance of the Purchase Price still unpaid at the rate of seven per centum (7%) per annum calculated from the commencement of the extended period until the full settlement of the balance Purchase Price. (emphasis added).

[22] On 16 November 2005, plaintiff's solicitors Messrs Gan & Tey wrote to defendant's solicitors Messrs Ajmer Sandhu & Ong to propose a joint inspection of the land on 18 November 2005 in order to hand over vacant possession to the defendant.

[23] *Vide* letter dated 17 November 2005, defendant's solicitors confirmed that the parties have agreed to a joint inspection of the land on 21 November 2005 at 2pm.

[24] On 21 November 2005, the parties through their representatives carried out the joint inspection.

[25] After the joint inspection, while the representatives were still at the school, defendant's representative one Yiap Toon Cheng penned these words: "I have jointly inspected the school site with Mr. Edwin Tan & Mr. Tang and confirm that the school administration has been relocated" ("the relocation confirmation"). Below these words were *inter alia* the signature and the name "Yiap Toon Cheng".

[26] On 22 November 2005, plaintiff's solicitors wrote to defendant's solicitors, confirming that the completion date of the SPA was 21 March 2006, with an extension of two months subject to payment of interest at 7% per annum.

[27] Defendant's solicitors *vide* letter dated 29 November 2005 to plaintiff's solicitors reiterated *inter alia* that the defendant was agreeable to the confirmation contained in the above letter of the plaintiff's solicitors.

[28] Plaintiff's solicitors *vide* letter dated 21 December 2005 to defendant's solicitors repeated the above completion date ie 21 March 2006.

[29] Defendant's solicitors *vide* letter dated 9 January 2006 to the plaintiff's solicitors reaffirmed that the defendant was agreeable to the contents of the letters dated 22 November 2005 and 21 December 2005.

[30] Between 22 November 2005 and 7 March 2006, defendant's solicitors did not dispute that vacant possession had been delivered to the defendant on 21 November 2005.

[31] However, defendant's solicitors *vide* letter dated 8 March 2006 to plaintiff's solicitors alleged that the defendant had all the while been prevented by the school from entering the premises and that vacant possession was only delivered to the defendant on 28 February 2006.

[32] Consequently, *vide* summons in chambers, encl. (8), filed in the High Court under O. 14A, the plaintiff sought a construction of cl. 12 and special conditions 1 and 3 of the SPA and a determination of the date of delivery of vacant possession of the land as well as the date on which payment of the balance ie 90% of the purchase price was due and payable under the SPA.

[33] Other relevant facts will be referred later in this judgment as and when necessary.

Applicability Of O. 14A

[34] Defendant's learned counsel Mr. N. Segaram submitted that the plaintiff's application is seeking a determination of a question of fact and not law, and so it should be determined at the full trial of this action and not summarily under O. 14A. Support was sought in:

(1) *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* [2003] 4 CLJ 337 CA; and

(2) *Lekaz Constructions Sdn. Bhd v. Kop Petroleum Sdn. Bhd* [2003] 4 CLJ 377 HC.

[35] It was argued by Mr. DP Vijandran learned counsel for the plaintiff that the plaintiff's application concerns a construction of the SPA and other relevant documents, in relation to the following issues:

(1) The date on which vacant possession of the land was to be given; and

(2) Whether the joint inspection on 21 November 2005 together with the relevant correspondence constituted delivery of vacant possession under the terms of the SPA.

[36] In order to resolve the above opposing submissions, it is necessary for me to refer to prayer (1) in the plaintiff's application which reads as follows:

Menurut **Aturan 14A** Kaedah-kaedah Mahkamah Tinggi 1980, kandungan Perjanjian Jualbeli bertarikh 19hb November 2004 yang dibuat antara Plaintif dan Defendan ditafsirkan, terutamanya Klausa 12 Perjanjian tersebut dan Syarat-syarat Khas No. 1 dan No. 3 dalam perjanjian tersebut untuk memutuskan tarikh Plaintif menyerahkan milikan kosong tanah yang dikenali sebagai Geran No. 101840 Lot No. 325 Mukim Simpang Kanan, Daerah Batu Pahat kepada Defendan.

[My Translation

(1) Pursuant to **Order 14A** of the Rules of the High Court 1980, the contents of the Sale and Purchase Agreement dated 19 November 2004 made between the Plaintiff and the Defendant be construed, in particular clause 12 of the Agreement and Special Conditions No. 1 and No. 3 of the Agreement to determine the date the plaintiff delivered vacant possession of the land known as Geran No. 101840, Lot No. 325, Mukim of Simpang Kanan, to the Defendant.]

[37] Upon a reasonable reading of the aforesaid prayer, I entertain no doubt that the plaintiff is seeking a construction of document ie the SPA, in particular cl. 12 and special conditions 1 and 3 thereof.

[38] Construction of document has been expressly stated in O. 14A r. 1(1) which reads:

Determination of question of law or construction (O. 14A r. 1)

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

a) such question is suitable for determination without the full trial of the action; and

b) such determination will finally determine the entire cause or matter or any claim or issue therein. (emphasis added).

[39] Our O. 14A r. 1(1) is adopted substantially from O. 14A r. 1(1) of the (UK) Rules of the Supreme Court, with the exclusion of the words contained in bracket in O. 14A r. 1(1)(b) *viz* "(subject to any possible appeal)". Order 14A r. 1(1) enables our High Court to determine any question of law or construction of document where it appears to the court that such question is

suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein (see *Petroleum Nasional Bhd, supra,* per Mohd Noor Ahmad JCA (later FCJ).)

[40] Where the construction of document will finally determine an issue under O. 14A and that issue is a dominant feature of a case, the High Court ought to proceed to so determine such issue: see *Korso Finance Establishment Anstalt v. John Wedge*, unreported, the English Court of Appeal Transcript No. 14/387 dated 15 February 1994, which was followed in *Petroleum Nasional Bhd, supra.* (See also *Lekaz Constructions Sdn. Bhd. Supra* HC, at p. 379 e-g per James Foong J (now JCA); and *Vohrah – Merican Sdn. Bhd. v. Gombak Land Sdn. Bhd.* [2006] 3 AMR 263 at p. 269 HC).

[41] In the light of the above analysis, I am of the view that the plaintiff's application comes within the ambit of the "construction of document" which is expressly provided in O. 14A r. 1(1). Hence, the submission presented for the defendant is not sustainable.

[42] I shall now consider the second contention raised for the defendant.

Question Of Law

[43] The defendant argued that no question of law is discernible from the pleadings and so it was not suitable for determination under O. 14A. For this proposition, reference was made to:

(1) *Watson & Anor v. Dutton Forshaw Motor Group Ltd & Ors*, EWCA, 22 July 1998 CA; and

(2) *Petroleum Nasional Bhd, supra.*

[44] The plaintiff's response is that the plaintiff was not invoking the "question of law" provisions under O. 14A, but has actually relied on the alternative limb pertaining to "construction of document".

[45] In *Watson & Anor, supra* cited for the defendant, the English Court of Appeal held *inter alia* that O. 14A is to be applied for deciding clear points of law or construction apparent on the pleadings. Order 14A is not narrowly confined to question of law

only, but is also applicable to construction of document which has been raised in the instant appeal. The judgment of the English Court of Appeal is clearly supportive of the plaintiff's contention based on construction of document.

[46] Pursuant to an application under O. 14A and O. 33 r. 2, three questions of law posed for determination in *Petroleum Nasional Bhd, supra,* were dismissed by the High Court, but the appeal therefrom was allowed by the Court of Appeal. While it is true that no issue has been ventilated in relation to "construction of document" under the alternative limb of O. 14A, I am unable to find anything in the judgment of our Court of Appeal that militates against the plaintiff's invocation of the alternative limb pertaining to "construction of document".

[47] With the utmost respect, I am unable to find any merit in the defendant's submission herein.

Material Facts

[48] The defendant next took the stand that a scrutiny of the pleadings reveals that material facts are disputed and so O. 14A is inapplicable, relying on:

(1) *Petroleum Nasional Bhd, supra;*

(2) *Seruan Gemilang Makmur Sdn. Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2004] CLJ 1 LNS 58 HC;

(3) *Dato Ng Tian Seng v. Toh Pee Yok & Ors* [2004] 5 CLJ 153 HC;

(4) *Federal Insurance Co. v. Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 CA Singapore; and

(5) *State Bank of India v. Murjani Marketing Group Limited And Others* EWCA 27 March 1991 CA.

[49] The plaintiff disagreed.

[50] *Petroleum Nasional, supra,* has been considered above. I shall not risk any repetition.

[51] In *Seruan Gemilang, supra,* three questions of law in relation to "a purported agreement" were raised pursuant to an application under O. 14A. Heliliah J (now JCA) held that they were unsuitable for determination under 014A.

[52] In addition, defendant's reliance on the "purported agreement" in *Seruan Gemilang, supra*, is alien to the instant appeal which revolves around a properly executed agreement, wherein the terms and conditions are eminently suitable for determination by way of construction.

[53] In *Dato' Tan Tian Seng, supra*, the respondents alleged *inter alia* that the petitioner under s. 181 of the Companies Act 1965 had no *locus standi* and that the petition was filed for a collateral purpose. The petitioner invoked O. 14A r. 1(1) in order to strike out and/or dismiss the petition. Syed Ahmad Helmy JC (now J) held *inter alia* that as the facts pertaining to the allegations of collateral purposes have been disputed by the petitioner, it does not fall within the ambit of O. 14A.

[54] In the Singapore case of *Federal Insurance Co, supra*, the appellants took out a notice under O. 33 r. 2 for an order to try the preliminary issue of whether the appellants' claim was in fact time-barred. The appellant's application was dismissed first by the registrar, then the judge-in-chambers and finally the Court of Appeal on the ground that there are disputed factual matters. Order 14A was never raised at any of the three stages of the proceedings.

[55] In *State Bank of India, supra,* the English Court of Appeal was concerned with an O. 14 application and not O. 14A. The facts therein were a little complex and involve proceedings in three different jurisdictions and so the Court of Appeal held *inter alia* that it was an inappropriate exercise under O. 14. Hence, the defendant's appeal against summary judgment was allowed. The plaintiff's reliance on O. 14A r. 1 was also rejected there.

[56] It is plain to me that none of the above authorities is capable of rendering any support to the defendant in the instant appeal.

Affidavits

[57] It was the defendant's contention that as the plaintiff's O. 14A application would finally determine the rights of the parties, affidavits based on hearsay evidence are not admissible; in particular, the affidavits affirmed by one Dato Tan Eng Boon and one Tang Pei Hau who are not in a position to personally verify the facts pertaining to the relocation of the school. The defendant referred to:

(1) Order 41 r. 5;

(2) *Hue Chooi Yin v. Chew Pit King* [2006] 4 MLJ 791 HC; and

(3) Singapore Court Practice 1999.

[58] The plaintiff contended that support was garnered from the defendant's own documents, and not from hearsay evidence.

[59] In my judgment, the general rule under O. 41 r. 5(1) is that where the rights of the parties are to be finally determined in a particular application, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. See eg. *Hue Chooi Yin*, *supra*, and *Singapore Court Practice 1999*, p. 540 para 14/13/4.

[60] In the instant appeal, the plaintiff is actually relying on the written acknowledgment by the defendant's representative on 21 November 2005 that the school had been relocated. This was further confirmed by the letters dated 22 November 2005 and 29 November 2005 respectively issued by the defendant's solicitors. In fact, the plaintiff was not resorting to hearsay affidavits.

Non-Pleaded Issue

[61] The defendant complained that despite the absence of pleadings in the plaintiff's statement of claim, the learned judicial commissioner had considered the construction of the word "relocation" as meaning "vacant possession".

[62] The plaintiff's response is that the issue had been specifically pleaded.

[63] The above submissions render it necessary for me to analyse the plaintiff's statement of claim, which I shall tabulate as follows:

Para in Statement of Claim	Issue Pleaded
3.2	Special condition 1 of the SPA, in particular the relocation of school.
3.4	Parties' joint inspection of the land.
3.25	The execution of the SPA between the plaintiff and the defendant. The school has been relocated.
4.1	Written acknowledgment by the defendant's representative of the relocation of the school.
1.3	Plaintiff's right to forfeit 10% of the purchase price under clause 12 of the SPA.

[64] In the light of the above pleadings, it is abundantly clear to me that the defendant's submission on the pleading point is wholly without merit.

Construction Of Documents

[65] For the purpose of construing special conditions 1 and 3 of the SPA as alluded to above, I find it essential to refer to the material words in special condition 3 *viz*: "From the date that the vendor confirms in writing that vacant possession is ready to be delivered to the purchaser pursuant to cl. 1 above and upon inspection and confirmation by the purchaser …".

[66] In my judgment, reading special conditions 1 and 3 together, vacant possession is deemed to be given upon the happening of two events *viz*:

(1) The vendor (the plaintiff) informs the purchaser (the defendant) that vacant possession is ready to be delivered; and

(2) Upon inspection and confirmation by the purchaser (the defendant).

[67] Determination of these two events would require an analysis of the factual background.

[68] By letter dated 16 November 2005, the plaintiff's solicitors had duly informed the defendant's solicitors that the plaintiff was ready to deliver vacant possession and set a date and time for inspection. Defendant's solicitors however changed the date for inspection to 21 November 2005 and gave the name of one Yiap Toon Cheng as the defendant's representative.

[69] On 21 November 2005, the defendant's representative inspected the site and penned the relocation confirmation.

[70] By letter dated 22 November 2005 to the defendant's solicitors, the plaintiff's solicitors confirmed the above and stated accordingly that the completion date would be 21 March 2006 ie four months to settle the balance of the purchase price.

[71] By letter dated 29 November 2005, the defendant's solicitors replied, confirming the contents of the letter from the plaintiff's solicitors dated 22 November 2005. However they added a proviso that the defendant was entitled to use the school and that the school should not be dismantled.

[72] The plaintiff's solicitors replied by letter dated 21 December 2005, agreeing to the defendant's take-over of the school building at the price of RM20,000. However, this take-over was "not a condition precedent" to the delivery of vacant possession. They then confirmed once again the said completion date ie 21 March 2006.

[73] Upon a true construction of special conditions 1 and 3 in the SPA and the correspondence between the parties' respective solicitors, I am of the view that vacant possession was ready to be delivered on 21 November 2005 and that the completion date was 21 March 2006, with an automatic extension of two months.

[74] The date on which vacant possession must be given is the completion of the sale and purchase which, according to item 10 of the schedule to the SPA and of special condition 1, is when the balance of the purchase price is paid ie four months plus two months from the date when the plaintiff confirmed that they were ready to give vacant possession and after inspection and confirmation by the defendant.

[75] The plaintiff had stated that "vacant possession is ready to be given" on 16 November 2005 and the inspection and confirmation by the defendant had been effected on 21 November 2005.

[76] The balance of the purchase price had to be paid within four plus two months from 21 November 2005 ie latest by 21 May 2006 as the extended completion date. However, the defendant has not done so.

Defendant's Alternative Contention

[77] The defendant had alternatively contended that the plaintiff had only given the defendant vacant possession, not on 21 November 2005, but on 28 February 2006 when the key to the fourth gate was given to the defendant. Even by taking this date of 28 February 2006, delivery of vacant possession of the land by the plaintiff to the defendant was still clearly some three months before the completion date ie 21 May 2006 when the defendant has to effect payment of the balance of the purchase price, but has failed to do so.

Conclusion

[78] On the foregoing grounds, I am of the view that the learned judicial commissioner has arrived at the correct decision under O. 14A. I hereby dismiss the defendant's appeal with costs and affirm the orders enumerated at the outset of my judgment. Deposit to the plaintiff on account of taxed costs.

Zainun Ali JCA:

[79] I have read the judgment of my learned brother, Low Hop Bing, JCA in this appeal and my response is as appended below.

[80] Both the factual background and facts including the reliefs sought have been clearly set out by His Lordship. Thus I shall dispense with them here, save where they appear necessary and relevant in the context of my judgment.

The Motion encl. 24(a)

[81] At the start of hearing of the appeal proper, Mr. Segaram, counsel for the appellant moved the court to hear his motion in encl. 24(a). Enclosure 24(a) filed on 22 August 2007, is a motion to adduce further evidence under r. 7 Rules of the Court of Appeal and s. 69 Courts of Judicature Act 1964.

[82] It is Mr. Segaram's case that the evidence which he sought to produce and be admitted are those exhibits in YTC1 to YTC5.

[83] Mr. Segaram intimated that these documents were not available at the time of hearing of the O. 14A application before the High Court.

[84] In invoking the principle found in *Ladd v. Marshall* [1954] 1 WLR 1489, Mr. Segaram submitted that all these letters (exhs. YTC1 to YTC5) go towards proving that the school was still on the premises and that the respondent had failed to comply with its obligation under the agreement and therefore vacant possession had not taken place.

[85] It is Mr. Segaram's case that if one were to carefully peruse the contents of some of these letters, particularly YTC4 and YTC5, the refutation of certain assertions therein clearly indicate that there is a dispute. In short, the date of vacant possession is in dispute.

[86] After having heard learned counsel for the respondent, DP Vijandran, who said that these documents were already available earlier, and that therefore the appellant should not be allowed their motion in encl. 24(a), and after having considered both parties' submissions in their entirety, we gave order in terms of the appellant's motion in encl. 24(a).

[87] Exhibits YTC1 to YTC5 in encl. 24(a) now form part of the appeal record.

However, as the facts of this matter unfold, my view is that the reception of the said evidence is encl. 24(a) was unneccessary.

Factual Background

[88] Briefly the appellant and respondent entered into a sale and purchase agreement on 19 November 2004 ("the agreement") in consideration of RM33.5 million, where the appellant agreed to buy and the respondent agreed to sell the land with an area of 5.8274 hectares or 14.4 acres, with 40 squatters and a school known as Sekolah Rendah Hwa Nan ("the school") thereon.

[89] The agreement contained Special Conditions (1) and (3) which require compliance.

[90] In Special Condition (1) the respondent was to evict 40 squatters and relocate the school from the land.

[91] The respondent had duly performed both these requirements. This had been confirmed and acknowledged by the appellant's representative upon the joint inspection of the said land on 21 November 2005, together with the respondent's representatives as required under Special Condition (3).

[92] Special Condition (3) states that from the date the respondent confirms in writing that vacant possession of the land is ready to be delivered to the appellant and upon inspection and confirmation by the appellant, the appellant shall have four (4) months from the said date to settle the balance of the purchase price to the respondent. The appellant is given an automatic extension of two (2) months in which to pay the balance of the purchase price on condition that the appellant pay late interest to the respondent.

[93] Since the school and its attendant issues seem to be central to the question before the court, a short description of the school would be helpful.

[94] The school occupied 0.75 acres or about 5% of the total land area, which is 14.4 acres. The school had four gates. Three of the gates were open, giving unlimited access to the premises to the appellant. However the fourth gate was not open due to its proximity to a busy road. The key to the fourth gate was given to the appellant only on 28 February 2006 upon its request.

Sequence Of Events

[95] On 16 November 2005 the respondent's solicitors wrote to the appellant's solicitors that their clients were ready to deliver vacant possession of the land. A date and time was set by the respondent for inspection of the site. However, the date for the said inspection was altered to 21 November 2005, at the appellant's request through its solicitors. The appellant named one Yiap Toon Cheng as the appellant's representative for this purpose.

[96] On 21 November 2005, the said Mr. Yiap together with the respondent's representative inspected the site. He acknowledged this in these terms:

> I have jointly inspected the school site with Mr. Edwin Tan and Mr. Tang and confirm that the school administration had been relocated.

[97] The next day, the respondent's solicitors by a letter dated 22 November 2005, wrote to the appellant's solicitor confirming the above and stated that accordingly the completion date will fall on 21 March 2006. (ie when balance of the full payment is due). A

[98] The appellant's solicitors by letter dated 29 November 2005 replied, accepting the contents of the said letter from the respondent's solicitors. B

[99] The appellant added a proviso to the effect that it be allowed to use the school house and for the said school not to be dismantled. C

[100] The respondent's solicitors replied in a letter of 21 December 2005, agreeing that the appellant take over the School building upon payment of a purchase price of RM20,000. However the respondent stated in clear terms that this sale of RM20,000 was "not a condition precedent" to the handing over of vacant possession. D

[101] The respondent once again stated and confirmed that the completion date was 21 March 2006. The appellant accepted this proposition. Thereafter the appellant took possession of the premises and commenced construction works thereon. E

[102] However on 8 March 2006, ie about a fortnight before the completion date (when balance payment is due), the appellant's solicitors, out of the blue, disputed the date of handing over of vacant possession and date of completion, alleging that vacant possession was only delivered to them on 28 February 2006, ie the date when the key to the fourth gate was given them by the respondent. F G

[103] Arguably, this would mean that the completion date (in the appellant's estimation), would fall approximately on 28 June 2006, with two months extension.

[104] Try as they might, the respondent and appellant were unable to resolve the issue between them. Following this impasse the respondent then filed this suit on 28 August 2006. H

[105] Subsequently the respondent by way of an O. 14A application sought *inter alia*, the court's determination with regard to the construction of the sale and purchase agreement dated 19 November 2006 entered into between the parties. Of particular interest would be the construction to be given to cl. 12 and I

Special Conditions No (1) and (3) of the agreement, to determine when the respondent had to deliver vacant possession of the respondent's land and further for a declaration of paras (a)-(g) of the statement of claim.

[106] In so far as the respondent is concerned, this vexed question as to what was the date that vacant possession was in fact given, is obviously a pure question of interpretation and construction of the agreement and admitted documents, which could be determined by the court under O. 14A, Rules of the High Court 1980.

[107] Predictably, the appellant took an opposite stance. The appellant contends that what the respondent sought to determine is no more than a determination of fact, namely on what date did the respondent deliver vacant possession of the land to the appellant. The appellant submitted that therefore the respondent's O. 14A application is inappropriate when it is clear that the manifest object of O. 14A is only with regard to the court's determination of a question of law or construction of any document arising in any cause or matter without a full trial and such determination will finally determine the cause or matter.

[108] The appellant also contends that more importantly the respondent's O. 14A application is further jeopardized since it is replete with serious disputes as to material facts.

[109] The appellant cited several authorities to support this argument. They are *inter alia*:

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu [2003] 4 CLJ 337

Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang [2004] 1 LNS 58

Federal Insurance Co. v. Nakano Singapore (Pte) Ltd [1992] 1 SLR 390.

[110] The appellant went on to argue that even if O. 14A is appropriate, the respondents had not fully complied with its requirements. This is evident when there is no question of law framed by the appellant. Neither was there a specific question on the construction of the agreement forwarded by the respondent to the court for consideration.

[111] The appellant cited *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* [2003] 4 CLJ 337 and *Lekaz Constructions Sdn Bhd v. KOP Petroleum Sdn Bhd* [2003] 4 CLJ 377 in support of this contention.

[112] The appellant further submitted that the points of law to be determined should be discernible from the pleadings, ie the statement of claim and defence. But since the appellant had yet to file its defence at the hearing of the O. 14A application, the learned Judicial Commissioner in the court below could not have sufficiently identified the relevant issues arising from the action, without the benefit of the appellant's defence.

[113] The appellant submitted that in the absence of its defence, the learned Judicial Commissioner confined himself merely to the averments of the respondent in its statement of claim. (See *Watson & Anor v. Dutton Forshaw Motor Group Ltd & Ors* EWCA, 22 July 1998 Court of Appeal)

[114] The appellant also found fault with the respondent's affidavits affirmed by one Dato' Tan Eng Boon and one Tang Pei Hua respectively, since they deposed to such facts as are not within their own personal knowledge and they would therefore not be in a position to personally verify the facts. Among others, this relates to the fact that the school administration had allegedly moved out from the school premises.

[115] The appellant contends that since the nature of an O. 14A application will finally determine the rights of parties, affidavits such as those affirmed by Dato' Tan Eng Boon and Tang Pei Hua, based on hearsay as it were, should not be admissible. Thus in this connection, the issue regarding the date of delivery of vacant possession of the school ought to be determined in a full trial.

[116] The appellant did not also find favour with the respondent being allowed to argue non-pleaded issues. This arose when at the hearing in the High Court, the respondent counsel raised the issue that under Special Conditions No. (1) and (3) of the agreement "to relocate the school must be construed as "to move the school to a new premise, thus confirming that the date of delivery of vacant possession was on 21 November 2005."

The appellant contended that the respondent did not plead this in its pleadings.

The question that looms large is this.

Is the issue regarding the date when vacant possession is to be given to the appellant, (based on the relevant clauses of the agreement and joint acts of inspection and confirmation of parties) a question of fact, OR is it a question of law or construction as envisaged under O. 14A?

Order 14A reads as follows:

> (1) The Court may upon the application of a party or of its own motion determine any question of law or **construction of any document** arising in any cause or matter at any stage of the proceedings where it appears to the Court that:
>
> a) such question is suitable for determination without the full trial of the action; and
>
> b) such determination will finally determine the entire cause or matter or any claim or issue therein. (emphasis added)

[117] It is the appellant's case that the determination of the date of vacant possession is no more than a question of fact, rendering an O. 14A application wholly inappropriate.

[118] To compound the problem, the appellant also made it clear that there are disputed questions of fact involved, disentitling the respondent from making an application under O. 14A.

Let us now look at the said "disputed questions of fact".

[119] Disputed Questions Of Fact

(a) The appellant's first allegation of "disputed fact" concerns the school's relocation. The appellant contended that the school was not relocated by 21 November 2005.

However this 'dispute' becomes irrelevant in the light of the acknowledgment by the appellant's representative, Mr. Yiap Toon Cheng, who in clear terms on 21 November 2005, confirmed the school's relocation.

(b) The appellant's second allegation of fact in dispute relates to the written acknowledgment given by the said appellant's representative, Mr. Yiap Toon Cheng. The appellant contended that the said written acknowledgment by Yiap after the joint inspection did not amount to vacant possession being given on 21 November 2005 since Yiap had merely said:

> … I have jointly inspected the school site with Mr. Edwin Tan and Mr. Tang and confirm that the school administration had been relocated.

My view is that the purpose of the joint inspection as provided in the Agreement was to ascertain whether the school had been relocated to another site. Mr. Yiap's acknowledgment that it had, is clear and unequivocal. The question is, in the light of cl. (3) of the agreement, does the joint inspection and confirmation of the school's relocation amount to vacant possession being given on 21 November 2005? The respondent says it does. If the appellant contended otherwise, then this issue can only be determined on a proper interpretation and construction of the act of acknowledgment by the appellant's representative on 21 November 2005, taken and read in conjunction with the respondent's letter dated 16 November 2005 and the subsequent confirmation thereof through letters dated 17 November 2005, 22 November 2005 and 21 December 2005.

(c) The appellant's third allegation of "disputed fact" is that the school did not allow unrestricted access to the school after 21 November 2005.

Surely this allegation is to be treated with askance, in the light of the appellant's commencement of construction works on the premises. If vacant possession had not already been given as appellant contended this could only mean that the appellant had been trespassing on the said premises.

(d) The fourth allegation of "disputed fact" relates to the issue that the appellant was given keys to the school only on 28 February 2006, thus precluding access to the premises.

I find this contention baseless and misleading. Considering that three of the four gates were not locked, the question of accessibility is a non-issue, *a fortiori* when considering that the appellant had begun construction works on the premises. It was only the fourth gate which remained locked, due to its proximity to a busy road. Upon its request, the key to the fourth gate was given to the appellant on 28 February 2006.

Now, flying in the face of the appellant's own conduct and letters to the contrary, the appellant contend that vacant possession was given them only on 28 February 2006, ie the

A date the key to the fourth gate was given. This also means that in so far as the appellant was concerned, the date of completion is consequently shifted to 28 June 2006, plus two months extension.

B (e) The appellant's fifth allegation of "disputed fact" relates to the central issue of the date when vacant possession was given. The appellant took the position that it was not given on 21 November 2005 as submitted by the respondent but only on 28 February 2006.

C It is evident that the respondent's letters spoke in clear terms regarding confirmation of the date of vacant possession being 21 November 2005, which was not only NOT challenged by the appellant, it was in fact ACCEPTED by the appellant in its letters.

D It is of course banal to state that any denial, objection or challenge, should there be any, ought to be made promptly.

As Lord Esher MR, in *Wiedeman v. Walpole* [1891] 2 QB 534 E tersely observed:

> … if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.

F Clearly the appellant's lack of promptness in objecting to the contents of the respondent's letters as to the date and vacant possession and date of completion, now works against the appellant. More importantly, the appellant's clear acceptance of G the contents of the respondent's letters did not reconcile with the appellant's later and subsequent position denying them.

(f) The appellant's sixth issue concerns the problem of its representative Mr. Yiap Toon Cheng having to contact the school's administrators to seek permission to access the school H compound.

[120] This latest non-issue thought up by the appellant reinforces my view that the alleged disputes of fact are largely misconceived, since the said "disputes of fact" relate to the problems the school I had with the respondent. The appellant is not privy to the understanding or agreement which the respondent had long had with the school and its administrators.

[121] For the appellant to now take advantage of the school's problems with the respondent merely to show existence of facts in dispute, manifests the appellant's machinations in trying to put off paying the balance of the purchase price. It is also irrelevant, since the appellant had nothing to do with the respondent's problems with the school.

[122] In any event the sixth alleged "dispute of fact" has no bearing whatsoever on the question of interpretation as to the date of vacant possession.

[123] It would appear that the alleged "disputes of fact" are contrived by the appellant, as an afterthought. In any case, the alleged "disputes of fact" have been sufficiently addressed by the learned Judicial Commissioner in his judgment.

[124] Such being the position, the next question is whether this matter can be resolved through the O. 14A regime.

[125] What then is the ambit of O. 14A?

[126] The English Court of Appeal, in reviewing the scope of O. 14A in the unreported 1994 case of *Korso Finance Establishment Anstat v. John Wedge inter alia*, had this to say:

> 1. An issue is a disputed point of fact or law relied on by way of claim or defence.
>
> 2. A question of construction is capable of constituting an issue.
>
> 3. If a question of construction will finally determine whether an important issue is suitable for determination under Order 14A and where it is a dominate feature of the case, a court ought to proceed to so determine such issue.

[127] Then again in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* [2003] 4 CLJ 337, our Court of Appeal observed that:

> … In our view even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of Order 14A and Order 33 Rule 2 in relation to the questions of law posed which are clear and definite and the issues are clear cut. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found.

[128] My view is that the question of what or when is the date of vacant possession in this case, depends very much on how one interprets or construes the terms of the agreement. A simplistic approach such as that taken by the appellant, where it was argued that it merely bears on it being a question of fact, makes for a superficial understanding of the question posed for the court's determination under O. 14A.

[129] In that regard my view is that this matter is suitable and appropriate to be considered within the dynamics of the O. 14A regime.

[130] Under O. 14A, the court can resolve issues of fact by examining such "facts" in order "to ascertain whether the allegations made are inherently incredible or patently inconsistent with contemporaneous documents" (per Court of Appeal in *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900).

[131] Before I proceed further, my view is that it is necessary to firstly address a pertinent point raised by the appellant as alluded to earlier. It is this; since the appellant had yet to file its defence, the appellant contends that the learned Judicial Commissioner had not had the benefit of reading the entire pleadings and was confined to reading only the statement of claim.

[132] The appellant's vigorous argument is that this is not what is contemplated under O. 14A since the arbiter must be fully appraised of the issues therein which can be discerned only when the defence is filed.

[133] However, authorities such as *Watson & Anot v. Dutton Forshaw Motor Group Ltd & Ors* [1998] EWCA 3245 22 July 1998 CA indicate that applications under O. 14A is to decide clear points of law or construction apparent on the pleadings. "Pleadings" as defined in the Rules of the High Court, 1980 merely says it "does not include petitions summons or preliminary act".

[134] Pleadings therefore cover a wide spectrum of the cause papers. The court can avail itself to the affidavits in support for example, which would depose the material facts relating to the questions of law or construction to be determined by the court. In the instant appeal, the affidavits filed bear testimony to the

unequivocal factual events. The court is competent to identify the material facts pleaded and conclude that they should not have been disputed at all or otherwise.

[135] In this connection one has to envisage the purport of O. 14A, which is that where it appears to any party that a question of law or construction is apparent on the pleadings and determination by the court will finally dispose of the matter, this order can be invoked without the necessity of having to wait for the defence to be filed or waiting for the gamut of case management to take place and finalised. Waiting for these would defeat the very reason for the existence of the order. Apart from the requisite provisions in the order, as long as the statement of claim is clear, as are the affidavits in support as regards the question of law or construction to be determined, which would finally dispose of the matter, the court's power for summary disposal under this order is assured.

[136] The said approach, read with the express terms of the order which specify that applications can be made "at any stage of the proceedings" is to be distinguished from the provision of other orders in the Rules of the High Court 1980, which expressed that applications can be made only after "pleadings are closed".

[137] As succinctly put by Lightman J in *Mohamed v. Alaga & Co* [1998] 2 All ER 720:

> … Under Order 14A, the Court can decide any question of law at any stage of the proceedings if that question is suitable for determination without a full trial of the action and such determination will finally determine the entire action or any claim or issue therein. Order 14A is accordingly not apt for determining a question which involves a question of fact. (emphasis added).

[138] This point is reinforced in the case of *Muhamad Zain bin Sidek v. Suruhanjaya Perkhidmatan Awam Malaysia* [2002] 779 MJU 1 where Syed Helmy, J observed that:

> … It should be borne in mind that Order 14A was introduced to cater for situations where points of law (and not facts) are fit for summary disposal. …
>
> The position of an application under Order 14A is similar to that under Order 14 in that it should be made only if the Court thinks it is a plain case and ought not to go for trial …

[139] Thus if a party has a simple matter of construction to be determined such as in the instant appeal, the court in such summary application should decide what in its judgment is the true construction and effect thereof. (See *Esso Standard Malaysia Berhad v. South Cross Airways (Malaysia) Bhd* [1972] 2 MLJ 168.)

[140] Then again, in *MP-Bilt Pte Ltd v. Oey Widarto* [1999] 3 SLR 592, a Singapore case involving the sale and purchase of a condominium unit where the developer sued the purchaser to recover unpaid progress payment, and the developer subsequently applied under O. 14 r. 12 (which is equivalent to our O. 14A), the court below based as it were, on the statement of claim and supporting affidavits, gave the purchaser unconditional leave to defend. The developer appealed. G.P Selvam, J had this to say:

> … Order 14 rule 12 was introduced to enable the Court to effect summary disposal of cases by determining any question of law or construction arising in any cause or matter at any stage of the proceedings. This is an implementation of a recent and present movement towards a speedy solution to civil disputes where oral evidence is unnecessary. The new procedure should be put to use in cases where all relevant and necessary evidence is documentary …

[141] Clearly from all these authorities, the appellant's proposition that a defence must first be filed before the court can hear an application under O. 14A is misconceived.

[142] The scope of O. 14A is such that "real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found". (See *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* [2003] 4 CLJ 337 Court of Appeal)

[143] In the *Petroleum* case above, the Court of Appeal found that the trial judge had failed to identify the material facts which are disputed or undisputed or which ought not to have been disputed.

[144] The appellant contends that the disputes of fact are apparent from the affidavits.

[145] So how does one treat the issue of conflict of evidence on affidavits as are said by the appellant to exist in the instant case?

[146] My view is that the principles applicable to affidavits in an O. 14 application is equally applicable to an O. 14A application.

[147] Lord Diplock in the Privy Council decision of *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 observed that:

> … Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as rising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

[148] In the same vein, it is trite that a mere assertion in an affidavit of a given situation, which is to be the foundation of a defence, does not provide leave to defend. It is imperative for the court to look at the whole situation and ask itself whether the defendant has satisfied the court that there is a reasonable probability of the defendant having a *bona fide* defence.

[149] It is my view that the learned Judicial Commissioner in the court below had identified and made a more than adequate appraisal of the material facts pleaded in the instant appeal and found them to be obviously undisputed.

[150] I agree with the findings of the learned Judicial Commissioner. As was clearly stated in a Supreme Court Practice of 1999 (Singapore):

> … Where the court is satisfied that there are no issues of fact between the parties, it would be pointless to give leave to defend on the basis that there's a triable issue of law, and this is so even if the issue of law is complex and highly arguable.

(See *The Supreme Court Practive 1999* para 14/4/12).

[151] This principle was approved and applied in cases such *European Asian Bank AG v. Punjab and Sind Bank (No. 2)* [1983] 2 All ER and more recently in the Singapore Court of Appeal in *Tokyo Investment Pte Ltd & Anor v. Ian Chor Thing* [1993] 3 SLR 170.

[152] It is also competent to take another approach to this matter.

[153] What can also be discerned is that upon a proper and true construction for the handing over of vacant possession, anxious scrutiny must be had to the relevant clauses in the agreement. Under cl. 1 of the Special Conditions, the vendor is given nine months with an extension of three months … "to relocate the school in order to hand over vacant possession of the said property to the purchaser".

[154] The period prescribed is "in order to hand over vacant possession". No actual reference is made for any time period for the actual handing over.

[155] The material part of cl. 3 reads as follows:

> From the date that the vendors confirms in writing that vacant possession is ready to be delivered to the Purchaser pursuant to Clause 1 above and upon inspection and confirmation by the Purchaser, the Purchaser shall be given four (4) months from the date thereof to settle the balance of the Purchaser Price to the Vendor, with an automatic extension of two (2) months …

[156] So under this clause the vendor is required to confirm in writing that vacant possession "is ready to be delivered" pursuant to cl. 1.

[157] So at which point in time can it be said that the vendor is in a state of "readiness" to deliver vacant possession pursuant to cl. 1?

[158] Clearly it occurs when the school has been relocated as required under cl. 1. It does not, *ipso facto*, state that vacant possession must be physically delivered at that time.

[159] In other words, upon relocation of the school, the respondent is set and prepared and ready to deliver vacant possession. This is to be followed by inspection and confirmation by the appellant that the school had indeed been relocated.

[160] Even after the said inspection and confirmation of the same, the agreement does not prescribe any time frame for delivery of vacant possession.

[161] The point of time at which vacant possession must be delivered is contained in cl. 6 of the agreement which reads:

The sale and purchase herein is free from encumbrances and with vacant possession to be given to the Purchaser on completion of the Sale and Purchase herein.

[162] Which means that vacant possession must be given upon completion of the sale and purchase (item 10 of the Schedule and cl. 1 of the Special Conditions) ie when the balance of that purchase price is paid ie four months plus two months from the time the respondents confirmed that they were ready to give vacant possession and inspection had been held.

[163] On 16 November 2005 the respondent had intimated that "vacant possession is ready to be given". But the inspection and confirmation by the appellant was completed only on 21 November 2005, at the appellant's behest.

[164] The balance of the purchase price had then to be paid within four plus two months from 21 November 2005 ie at the latest, on 21 May 2006. Vacant possession is to be given only after the balance purchase price is paid i.e on or before 21 May 2006.

[165] If this was the case, then vacant possession is to be given only on 21 May 2006, when the balance of the purchase price was to be paid. However, the appellant contend that vacant possession was only given on 28 February 2006 when the key to the fourth gate was given. Even if this is accepted, on the basis of this interpretation, the respondent had in actual fact given vacant possession long before the due date.

Other Points Raised In The Memorandum of Appeal para. 4(c)

[166] This approach was not presented on these terms at the High Court stage, but since this is not a new but an alternative interpretation on the same documents and facts which were before the High Court, this is not a new point raised.

[167] Section 69(1) of the Courts of Judicature Act clearly provides that an appeal to be Court of Appeal shall be by way of re-hearing.

[168] As succinctly put by Gopal Sri Ram JCA in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & An* [1995] 3 CLJ 520:

> … the categories of cases in which an appellate court will admit a new point are not closed. The governing principle is this: an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of the case. The factor for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

[169] In fact the Federal Court said this with greater intensity in *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23, when it observed:

> …. It is clear law that an appellate court is more likely to entertain a new point if it relates to a matter which had been before the court of trial, for example a new argument based … upon the construction of a document or upon facts admitted or proved beyond controversy …

[170] My view is that this court is entitled to look for the true construction of this matter albeit when the respondent had posed cl. 12 and Special Conditions (1) and (3) for determination. In that regard I find that the appellant's contention that the respondent had failed to pose a question of law or construction for the court's determination, to be baseless.

Para 4(e) And (h) Memorandum Of Appeal

[171] The appellant's submission that the deponents were incompetent to attest the said affidavits are untenable since the essential facts relied on by the respondent were not hearsay. They were attested to by persons who had personal knowledge of the same.

Para 4(i) Memorandum Of Appeal

[172] This allegation is unfounded since the issue on the school's relocation had been pleaded by the respondent at para. 3.5 and 4.1 (See pp. 25-26 record of appeal).

[173] Clearly the respondent's O. 14A application is appropriate since the question of the construction of relevant clauses pertaining to vacant possession in the agreement is a central feature of the dispute between the parties.

[174] It is my view that O. 14A gives leverage to the court to finally determine issues such as questions of law or construction which may finally be determined without the need for a full trial of the action.

[175] On a final note, it might be noted that the O. 14A regime is largely put in place to enable courts to effectuate speedy solutions to civil disputes where oral evidence is unnecessary.

[176] In fact courts are encouraged to enforce the rigours of the order, particularly in commercial and construction cases "where cash flow is the life blood to make commerce work." (per GP Selvam J in *MP-Bilt Pte Ltd v. Oey Widarto* [1999] 3 SLR 592.)

[177] In my view, for as long as it is clear that the legal requirements are in place, the court should not be diffident in confronting the issues in an O. 14A application.

[178] After considering this appeal in its entirety, my view is that the respondent's application under O. 14A seeking the courts' determination on a point of construction of the relevant clauses in the agreement pertaining to the date of vacant possession is pertinent and is in order.

[179] Consequently my view is that the appellant's appeal is to be dismissed with costs.